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No.

IN THE

Supreme Court Of The United States

A. ROBY LAL,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF PENNSYLVANIA

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Attorney for Petitioner

May 7th, 2005

QUESTIONS PRESENTED

1. Was the Petitioner denied the due process of law guaranteed to him by the United States Constitution when he was prosecuted by a Borough for offenses he did not commit and offenses which were legislatively constituted misdemeanors under the Borough Ordinance rather than summary offenses in violation of the enabling Pennsylvania legislation which provided that boroughs of the State were limited to legislating conduct as summary offenses under its ordinances and by implication prohibited from creating misdemeanors under its ordinances?

2. Was the Petitioner denied the equal protection of the laws guaranteed to him by the United States Constitution when he was singled out for prosecution because of his membership in a minority group by a borough council president who had no authority to issue citations against him because of the conflict of interest inherent in the elective office of borough president needing revenue which was easily obtainable through fines and the duties of a code officer?

3. Was the Petitioner denied the due process of law guaranteed to him by the United States Constitution (a) when the trial judge required an unreasonably large sum (more than three times the amount of the fine imposed by the district justice) to be paid into court under threat of contempt, (b) when the judge dismissed the Petitioner's appeal without disposing of pre-trial motions and on the pretense of his not being present at the hearing even though he was represented by an attorney and by a representative who assisted him in managing the property involved, and (c) when the trial judge did not follow the proper procedure for a contempt finding instituted by appellate courts, and (d) when respondent Pennsylvania failed to consolidate all pertinent citations for trial as required by law?

PARTIES

The caption contains the name of all parties to the proceeding below.

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

A. Roby Lal, Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
(BOROUGH OF MODENA), Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF THE COMMONWEALTH OF PENNSYLVANIA

INTRODUCTION

Petitioner, A. Roby Lal, respectfully requests that a writ of certiorari issue to review the judgments and opinions of the Commonwealth Court of Pennsylvania, with respect to which the Supreme Court of Pennsylvania denied allowance of appeal, including, without limitation, orders denying leave to file petitions nunc pro tunc, orders denying consolidation of two proceedings which are the subject of this petition for a writ of certiorari. The state court proceedings involved citations brought by the Borough of Modena, Chester County, Pennsylvania against the petitioner involving his one property in the Borough.

OPINIONS BELOW

The orders of the Supreme Court of Pennsylvania and the opinions of the Commonwealth Court of Pennsylvania appear in Appendix A and B to this Petition.

JURISDICTION

The Pennsylvania Supreme Court declined to accept a Petition for allowance of appeal because of late filing but permitted the filing of a Petition for leave to file a petition for allowance of appeal nunc pro tunc. The nunc pro tunc petition was filed but denied along with a motion for reargument/reconsideration. These petitions were denied by the Supreme Court of Pennsylvania by Orders dated August 9 and 2004, October 7, 2004. Upon Application No. 04A679, this Court granted an extension of time to file the present Petition for a Writ of Certiorari by March 6, 2005. A petition was filed, but because of a certain discrepancy in the format of the petition, which contained two cases in one and the same petition, the petition was returned and petitioner was allowed to submit two separate petitions on or before May 9, 2005.This Court's jurisdiction is invoked under Title 28, U.S.C. # 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, Amendment VI, Amendment VIII, Amendment XIV, Appear in Appendix C.

In addition the following statutory provisions are particularly relevant:
53 P.S. 48307
65 P.S. 13
18 P.C.S.A #110
18 P.C.S.A #312

STATEMENT OF THE CASE

Lower Court decisions: November 27, 2002 and January 16, 2003
Appellate Court decisions: January 29, 2004, March 31, 2004
Pa. Supreme Court Orders: August 9, 2004 and October 7, 2004.

Petitioner is a physician owned a rental property in a small Borough of Modena Pennsylvania with a population of around 600 inhabitants. He was assisted by his father, Amrit Lal, an

experienced real estate manager, in managing the property. Petitioner had made several repairs, improvements and renovations since his acquisition in 1993 to make it suitable for residential use. The Borough was in dire need of revenue and it can be inferred that the borough selectively targeted petitioner for the purpose of raising revenue through the writing of citations. The citations were written by the Borough Council President (Mr. Groce) who did not have legal authority under Pennsylvania law to act as code officer and write citations.

On or about December 16, 2001, Mr. Groce went to the property of the petitioner and wrote items of deficiency which need to be corrected. Petitioner arranged for a contractor to immediately attend to urgent matters and repairs which he did. Without providing a reasonable period of time, Mr. Groce immediately started writing citations. Within two (2) weeks of Mr. Groce's visits, the house became a victim of mystery fire on December 29, 2001 in which two small children perished. Because of this tragedy, neighbors and well-wishers left flowers, toys, and cards of sympathy in memoriam. Petitioner and his father who had looked after the property did not want to disturb the sanctity of this rural setting which had become a temporary shrine of sympathy, sadness and sorrow.

Soon thereafter, Mr. Groce wrote to petitioner's father that the property needed to be cleaned up. Petitioner was not certain whether the balance of the home could be saved. Upon contacting building developers and demolition contractors, it was discovered that it would be an expensive proposition to save and rehab the building. Bids were therefore sought for demolition and a contract was signed for demolition in March 2001. A copy of the contract was sent to Mr. Groce and the demolition contractor was requested to obtain whatever permits are needed and stay in touch with Mr. Groce. The demolition contractor had to obtain various types of permits (State Highway Department, Telephone Company,

Electric Company etc.) prior to renting heavy equipment machinery to demolish the building and clean up the site. All this was accomplished in early May 2002. Mr. Groce, without proper and prior notice, again started writing citations from April 3 to April 18, 2002 on the pretense that the building had not been demolished by the petitioner within sixty (60) days.

Mr. Groce would sit at home and write the citations and add the dates in sequence and then file them with the local district court. When a hearing date was set for these citations, petitioner was not notified and the local court found petitioner guilty of 52 separate violations in absentia on May 16, 2002. Petitioner contends that he filed a TIMELY Notice of Appeal to the Chester County Common Pleas Court on June 14, 2002 which was within the required thirty day appeal period. Petitioner contends that the court clerk made an error in docketing the notice and that he brought this fact to the attention of the Commonwealth Court with copies of the Notice of Appeal bearing the date within 30 days. However this was overlooked and thus constituted a grievous error of law.

Petitioner had retained the services of an attorney, Samuel Stretton, Esquire who filed a Motion to dismiss all the citations because of inherent conflict in the two positions being performed by one and the same person, an elected Borough Council President and a code official who is supposed to be a duly appointed employee with appropriate compensation. There was never a hearing or a fact-finding proceeding on the merits of the Motion to Dismiss filed by petitioner's attorney.

On the date of the hearing on November 27, 2002, the petitioner was not asked to be present in the court by his attorney because the pre-trial motion to dismiss the citations had not been heard by the court. Nevertheless, the court summarily dismissed the appeal because the petitioner, himself, was not present. He was only represented by his father who had been property-managing

agent and by his attorney. The trial imposed a fine of $5,200.00 on all 52 of the citations but allowed petitioner's attorney Stretton to file a Motion for the court to accept the appeal nunc pro tunc because the original notice of appeal was not filed by the petitioner himself, albeit filed in a timely manner.

Meanwhile, the Borough's attorney filed a Motion for Contempt because $5000.00 had not been paid. The attorney for the Borough by a letter had informed petitioner's attorney that on the new date of hearing set for January 16, 2003, it would not be necessary to have the petitioner present because of the need to dispose of outstanding motions. For that reason, attorney Stretton did not require the petitioner to be present for the hearing.

On appeal, the Commonwealth Court of Pennsylvania affirmed the lower court and issued an opinion dated January 29, 2004. Upon application, reconsideration was denied on March 31, 2004.

Petitions for allowance of appeal to the Supreme Court of Pennsylvania were filed a two days after the expiration of the thirty day appeal period. The late filing was due to the hospitalization of the petitioner's father a week before the due date. The Pennsylvania Supreme Court allowed the petitioner to file a petition to allow the filing of a petition for allowance of appeal nunc pro tunc, but the petition and a motion for reargument/reconsideration were denied by Orders dated August 9, 2004, October 7, 2004

REASONS FOR GRANTING THE WRIT

A. FOURTEENTH AMENDMENT VIOLATIONS OF DUE PROCESS

For the most part, the reasons for granting the writ are the same in both this matter and a companion matter. It is apparent that there is arbitrary and oppressive use of police powers by Pennsylvania acting through the officials of the Borough of Modena, in mistreating the petitioner. It may be inferred that these fourteenth amendment violations are traceable to the national origin and Asiatic-Indian status of the petitioner, even though he is a U. S. citizen by birth.

The protection afforded by the Bill of Rights of U.S. Const. must be given by the States under U.S. Const., Amend. 14. Klopper v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). A provision of the Bill of Rights which is "fundamental and essential to a fair trial: is made obligatory on the States by the Fourteenth Amendment." Gideon v. Wainwright, 372 U.S. 535, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). See also, Pointe v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

In addition to being obliged to provide Fifth Amendment due process, the states are directly obliged to provide due process and equal protection of the laws by the Fourteenth Amendment. In **Hagar v. Reclamation** Dist. No. 108, 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569 (1884), the court said (at p. 707 of 111 U.S.) with respect to the meaning of due process:

"What constitutes that process it may be difficult to define with precision so as to cover all cases....It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law;

it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In Handi v. Rumsfeld, 124 S.Ct. 2633, 159 L.Ed.2d 578 (U.S. 2004), this Court discussed the procedures it uses to determine whether a citizen is being deprived of "life, liberty, or property without due process of law" as guaranteed by U.S. Const., Amdt. 5. Under Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) the Court determines the private interest which is affected by the official action against the asserted governmental interest and the governmental burdens in providing greater process.

(i) The petitioner was issued citations against his property by an elected official to the Borough council who had no legal authority to write the citations. A motion to dismiss all the citations was made due to the dual and conflicting functions of the Borough Council President and a code enforcement officer. The trial court did not rule on the motion in contravention of the Pa. Rules of Criminal Procedure, Rule 580 which provides that "all pretrial motions shall be determined before trial. Trial shall be postponed by the court for the determination of pretrial motions, if necessary." This rule is unequivocal and does not provide an exception even for motions considered late by the trial judge.

This pretrial motion to dismiss all the citations went to the underlying legality of the proceedings against the petitioner because it challenged the authority of the code officer to act in dual capacity. The motion made by petitioner's attorney alleged that there was incompatibility in fact between the office of Code Enforcement

and the President of the Borough Council to which Mr. Groce admitted that he was both an elected member of the Borough Council and an employee of the Borough. The law in Pennsylvania, 65 P.S. 13 provides:

"No member of said councils shall hereafter hold any office or employment in the choice of said councils during the term for which he shall have been elected."

In addition, 53 P.S. 46104 prohibits an official acting in a dual capacity where there is incompatibility in fact. The Respondent's argument that the statute does not cover a small municipality overlooks that the Commonwealth Court itself held in **Appeal of Swigart,** 544 A.2d 74 (Pa.Cmwlth.1988) that municipal adjudication bodies must avoid unnecessary conflicts and commingling of incompatible functions. In **Appeal of Warminster Township,** 56 D. & C. 2d 99 (Bucks County Court 1971), the court pointed out that it is against the public policy of this Commonwealth for an officer with the power of an appointing official to appoint himself to a compensable position. In this case, the appointment was not made by any resolution or action of the Borough Council. Such an event must strictly be construed according to law and the explicit direction of the Pennsylvania legislature. Even if an exception were to be found, the appointment itself was not a legally valid appointment because there is no written record of the appointment in the Minutes of the Borough Council Meetings. Nor is there any record of seeking a special dispensation from the County Court for such an appointment.

The Court's attention is respectfully drawn to the fact that because of procedural niceties, the merits of the petitioner's claim that the code officer's actions were illegal and unauthorized under Pennsylvania law were never heard nor decided.

(ii) The petitioner was denied due process of law guaranteed to him by U.S. Const., Amdt. 14 when he was prosecuted by the respondent Borough under its own ordinance for designated offenses misdemeanors which he did not commit. The ordinance

of the Borough was legislatively defective and inoperative in this instance in that summary citations of this kind were not authorized under the Borough's Code.

There is no dispute that the Borough Ordinance under which petitioner was prosecuted was defective and void. Under Section 3301 of the Pennsylvania Borough Code, 53 P.S. 48301, (as distinguished from Modena Code), the violation of a municipal ordinance can result in no more than a summary conviction. Moreover, had misdemeanors been charged as mandated by the Borough Code pursuant to the Borough Ordinance, but contrary to Pennsylvania law, petitioner would have been entitled to a jury trial. Accordingly, the ordinance(s) of the Borough of Modena should have been found to be unenforceable against the petitioner. If the ordinance could be judicially amended, enforced and penalty raised ten fold, it follows then that the petitioner should have the benefit of a trial by jury. If excessive and unreasonable fines are to be imposed, then the petitioner should not be denied a jury trial in summary offenses as a protection against judicial bias. See **Blakely v. Washington,** 124 S. Ct. 2531, 159 L.Ed.2d 403 (U.S. 2004), wherein it was held that the Sixth Amendment right to trial by jury is no more procedural formality, but rather, is a fundamental reservation of power in our constitutional structure, meant to ensure the people's ultimate control in the judiciary. 124 S. Ct. at 2538, 2539.

If an ordinance has not been validly enacted, it leads to arbitrary and selective enforcement. Municipal ordinances which are oppressive on their face are unconstitutional in violation of the Fourteenth Amendment. See **Lawton v. Steele,** 152 U.S. 133, 14 S. Ct. 499 (1894). In **Fuentes v. Shevin,** 407 U.S. 67, 92 S.Ct.1983, 32 L.Ed.2d 556 (1972) it was held that prohibition against deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

Under the Fourteenth Amendment, Pennsylvania may not authorize deprivation of protected liberty or property interest without providing procedure in connection with that deprivation that meets the requirements of due process. Sample v. Diecks, 885 F.2d 1099 (3d Cir. 1989). In petitioner's case, there was no dire necessity and the actions of the Borough were not calculated to alleviate or prevent a danger to the health and safety of any one.

The Court's attention is again respectfully drawn to the fact that the petitioner never had an opportunity to present his arguments with respect to the legality of the ordinance to the courts below because of procedural niceties which were resolved against him. The trial court never reached the substance of his arguments which resulted in an obvious deprivation of due process of law.

B. SIXTH AND EIGHTH AMENDMENT VIOLATIONS

As set forth previously, the protection afforded by the Bill of Rights of U.S. Const. must be provided by the States under U.S. Const., Amend. 14. Klopper v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967) and other cases cited, supra.

Pennsylvania Law at 18 Pa.C.S. 312 provides:

"(a) General Rule – The court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the conduct of the defendant:
(1) was within a customary license or tolerance, neither expressly negatived by the person whose interest infringed nor inconsistent with the purpose of the law defining the offense;
(2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
(3) presents such other extenuation that it cannot reasonably be regarded as envisaged by the General Assembly or other authority in forbidding the offense."

In Commonwealth v. Moll, 375 Pa. Super. 147, 543 A.2d 1221 (1988), the court pointed out that de minimis section 312 of 18 Pa.C.S. was intended to apply "where no harm occurs either to the victim or to society, generally." The alleged offenses in the cases at bar were "too trivial to warrant condemnation of conviction" much less the hefty penalties imposed upon the petitioner. Even if the court were to impose a fine, it should have been limited to one and only one citation because of the same defendant, same property, same circumstance and same situation. Commonwealth v. Shull, 811 A. 2d 1 (Pa. Super. 2002).

The monetary penalties imposed in this case are excessive in violation of U.S. Const., Amdt, 8. Threatening to find the petitioner in contempt without the kind of due process normally provided by the state and without serious fault simply to extract $18,000.00 is oppressive and a violation of the 8th Amendment. There is no defensible rationale for the increase of the penalty of $5,200.00 in the November 27, 2001 order to $18,000.00 on January 16, 2002. Arbitrariness and appearance of impropriety were at a maximum level in the treatment of this petitioner who had acted with reasonable and due diligence through his representatives who had his power of attorney or had duly entered his appearance on behalf of the petitioner. As argued below, it was error to require the petitioner to be present when his duly authorized attorney, a member of the bar, was present on his behalf.

The purpose of the Eighth Amendment was to limit the government's power to punish. See Browning Ferris v. Kelco Disposal, 492 U.S. 257, 267, 109 S.Ct. 2909, 2916, 106 L.Ed.2d 219 (1989). The cruel and unusual punishment clause is self-evidently concerned with punishment with excessive fines. Austin v. United States, 509 U.S. 602,113 S. Ct. 2801, 125 L.Ed.2d 488 (1993). In U.S. v. Baj, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), this Court explained the Excessive Fines clause of the 8th Amendment which prohibits the imposition of excessive fines. Fines are monetary payments imposed as punishment. The penalties in the case at bar certainly qualify. This Court

pointed out that the amount of a forfeiture must bear some relation to the severity of the offense it is designed to punish. A standard had not previously been articulated. The Court said (at p. 334 of 524 U.S.):

"We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."

It has been held that the Excessive Fines Clause applies to the States. **Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,** 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001).

In the case at bar, the petitioners offenses charged were only what the Borough considered slow action to clean up his property after a fire which was not his fault, and to fail to appear at a hearing wherein his representative, a close relative with power of attorney and a member of the bar both appeared on his behalf. The petitioner is a medical doctor and had a crowded schedule of medical appointments in State College, PA, at least a three hour drive from the Chester County Courthouse. In the imposition of the penalty imposed it appears that the trial court exceeded the parameters of the Excessive Fines Clause of the 8th Amendment.

As argued in Section A, above, since the state chose to impose excessive monetary penalties on the petitioner, then it should have provided him the protection of a trial by jury as required by the Sixth Amendment. Furthermore, since the offenses for which he was tried were, under the ordinance involved, misdemeanors, it was error not to afford a trial by jury. The state ignored the defect in the statute which should have prevented a trial at all, and then compounded the problem by not allowing the procedural safeguard which was implied by the statute as written.

C. DOUBLE JEOPARDY

The Double Jeopardy Clause of U.S. Const., Amdt. 5, provides that no one shall "be subject for the same offense to be twice put in jeopardy of life or limb." The constitutionality of the trial court punishing the petitioner for code violations and also holding him in contempt is thrown into doubt by this Court's holding in, U.S. v. Dixon, et al., 509 U.S. 688, 133 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

This petitioner was subjected to double jeopardy as is apparent from the 8th Amendment violations by the respondent State of Pennsylvania. In U.S. v. Ward, 448 U.S. 242, 100 S.Ct.2636, 65 L.Ed.2d 742 (1980), it was held that where a statutory scheme is" so punitive either in purpose or effect as to negate" the civil label, it is deemed criminal for purposes of the constitutional protections.

In United States v. Ogbuehi, 897 F. Supp. 887 (E.D. Pa. 1995), it was held that a civil sanction, such as a forfeiture, which goes beyond remedial purpose and can only be explained as also serving retributive or deterrent purpose will be considered punishment for double jeopardy purposes.

Clearly, in the case being submitted here, all the fifty-two prosecutions are essentially for one and same offense against one and the same petitioner flowing from one and the same property. Here it can be inferred that the punishment is not for remedial purpose but for raising revenue for a cash strapped tiny municipality on a selective basis against a person of Asiatic Indian ethnicity based on his national origin.

The Court's attention is drawn to Yates v. U.S., 355 U.S. 66, 78 S.Ct. 128, 2 L.Ed.2d 95 (1957), wherein the Court held it a violation of the Double Jeopardy Clause for a trial court to

find eleven different incidents of contempt against a defendant who refused to answer eleven separate questions related to the same general topic on cross examination. This Court will not allow the multiplication of the criminal consequences of several occurrences of what is essentially the same act.

D. DEPRIVATION OF DUE PROCESS

Petitioner was deprived of due process in that required notices by the Borough were defective. For example, it gave only 3 days to correct the demolition of a retaining wall. The notice did not provide for a reasonable time to correct the condition complained of. This was a violation by the respondent Borough (or Pennsylvania) even though Section 106 of the Property Maintenance Code of the Borough of Modena required that notices of violation must provide reasonable time. In **Manna v. City of Erie,** 27 Pa. Cmwlth. 396, 366 A. 2d 615 (1976) the court held that a property owner must be given with "notice of the action, a copy of the alleged violations, reasonable time to file a written response, and an opportunity for an oral appearance" for a hearing in case of disagreement. No such opportunity was provided. In fact the Borough did not even have a proper office or a secretary or a manager where petitioner or his representative could call or complain.

The trial court's decision to dismiss the appeal from the local district court because the petitioner was not present in the court failed to recognize that petitioner was represented by an attorney and by his father who held a general power of attorney. In reviewing this matter, the Commonwealth Court of Pennsylvania contradicted its own ruling or teaching in **Commonwealth v. McConley,** 754 A.2d 724 (Pa.Cmwlth. 2000) and **Commonwealth v. Mesler,** 732 A.2d 21 (Pa.Cmwlth. 1999). A double and disparate standard was applied to the petitioner.

Similarly, in the contempt proceeding which was finally rendered moot because of the petitioner's father's agreement to pay $18,000 into court the usual five step procedure set forth in McMahon v. McMahon, 706 A.2d 350 (Pa. Super. 1998) for such purposes was not followed by failing to proceed with a rule to show cause, scheduling another hearing for the petitioner to prepare. It appears that if the petitioner is of a diverse ethnicity, he does not have the benefit of the plain language of the law being applied. That is disparate treatment, denial of due process and equal protection.

Finally, to consolidate the state proceedings into one case would have lightened the petitioner's burden of defending against the charges and of appealing the convictions, with no detriment to the borough as provided in 18 P.C.S. #110.

CONCLUSION

For the reasons outlined above, Petitioner requests that the petition for the writ of certiorari be granted or the Court may summarily reverse and remand.

Respectfully submitted,
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APPENDIX A

ORDERS AND OPINIONS OF COURTS

ORDERS OF THE SUPREME COURT OF PENNSYLVANIA

No. 86 MM 2004
PER CURIAM

AND NOW, this 9th day of August 2004, the Petition for Leave to File Petition for Allowance of Appeal Nunc Pro Tunc and request for Consolidation are denied.

No. 86 MM 2004
PER CURIAM

AND NOW, this 7th day of October, 2004, the Application for Reconsideration/Reargument is denied.

APPENDIX B

OPINIONS OF THE COMMONWEALTH COURT:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
v.	:	No. 1634 C.D. 2003
Adhinayak Roby Lal, Appellant	:	Submitted: November 21, 2003

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE BONNIE BRIGANCE LEADBEUER, Judge
HONORABLE JESS S. JIULIANTE, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE JULIANTE FILED: January 29, 2004

Adhinayak Roby Lal (Lal) appeals from the January 17, 2003 order of the Court of Common Pleas of Chester County (trial court) that denied Lal's petition to reinstate appeal nunc pro tunc. We affirm. Lal was cited by the Borough of Modena (Borough) for 52 violations of Borough Ordinance 305.1 due to the accumulation of trash and rubbish on his property. By notice dated April 5, 2002, the District Justice informed Lal that a hearing on the charges would be held on May 16, 2002. On that date, the District Justice found Lal guilty in absentia) and sentenced him to pay fines within 30 days. On July 26, 2002, Lal filed an appeal with the trial court and a hearing was set for November 27, 2002. On November 25, 2002, Lal filed a motion to

[1]The Borough contends that Lal sent his father, Amrit, to appear at the District Justice bearing on his behalf. Over the objection of the Borough, the District Justice proceeded with the hearing and found Lal guilty. In his Order Imposing Sentence, the District Justice checked the box indicating that " 5/16/02, your trial on the above charge(s) was held in the Magisterial District Court listed above in your absence pursuant to Pa.R.Crim.P. 455." (C.R.10)

dismiss, alleging a conflict of interest where the Borough's Code Enforcement Officer was also the Borough Council president. At the November 27, 2002 hearing, Lal's father, Amrit, testified that although the subject property was titled to his son, he maintained the property and had power of attorney to manage his son's business affairs. He further stated that he would take full responsibility for any monetary verdict the trial court might enter. In addition to alleging that he failed to receive notice of the District Justice hearing, Amrit stated that his son was unable to attend the hearing because of professional obligations in another county.

At the conclusion of the hearing, the trial court stated that it was not convinced that Amrit had legal authority to act on behalf of Lal or had standing to participate in the proceedings. Therefore, the trial court gave Amrit the opportunity to present to the court a power of attorney later that day. Amrit failed to do so; consequently, the trial court struck Lal's appeal and ordered payment of the fines imposed by the District Justice. Additionally, the trial court indicated to the parties that it would entertain a motion to reinstate the appeal because it was not clear whether Lal was notified of the November 27, 2002 hearing.

On December 19, 2002, Lal filed a motion to reinstate the appeal and a hearing was scheduled for January 16, 2003. The Borough also filed a motion for contempt of court on the ground that Lal failed to pay the imposed fines. Both matters were to be heard at the same time. On January 16, 2003, however, Lal once again failed to appear and his father Amrit attended the hearing.

The trial court dismissed Lal's petition to reinstate the appeal and proceeded to consider the Borough's petition for contempt. After an off-the-record discussion, counsel indicated that Amrit had obtained a cashier's check in the amount of $18,000, which was remitted to the Clerk of Courts.

Accordingly, the trial court entered an order on January 17, 2003 denying Lal's petition to reinstate the appeal and finding the Borough's motion for contempt of court moot by virtue of Amrit's remittance of $18,000 to the Clerk of Courts. Five thousand dollars of the $18,000 was to be released to the Borough in order to allow it to clean the property. If Lal chose not to appeal the trial court's order, then the remaining monies were to be released to the Borough to apply toward the outstanding fines, court costs and interest that may be due to the Borough. The order further provided that should Lal prevail on appeal, he was entitled to the remaining funds.

In this appeal, we need only address the issue of whether Lal's appeal of the District Justice's May 16, 2002 order was timely. We conclude that it was not and, therefore, affirm the trial court's order.

Section 5571(b) of the Judicial Code, 42 Pa. C.S. § 5571(b), provides that an appeal from a tribunal or other government unit must be commenced within 30 days after entry of the order from which the appeal is taken. Presently, the order from which the appeal was taken was the District Justice's May 16, 2002 order. Hence, Lal's appeal to the trial court had to be filed on or before June 17, 2002.[2]

Lal did not appeal the District Justice's May 16, 2002 order until July 16, 2002, well beyond the 30-day appeal period. Thus, the appeal was untimely. Nonetheless, the trial court gave Lal an opportunity to demonstrate that an appeal nunc pro tunc was warranted. In Criss v. Wise, 566 Pa. 437, 442-443, 781 A.2d 1156, 1159 (2001), the Supreme Court set forth the current principles governing nunc pro tunc appeals:

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2. June 15, 2002 was a Saturday and pursuant to Pa. R.C.P. No. 106(b), whenever the last day of any period falls on Saturday or Sunday, such day is omitted from the computation of time.

> [W] hen a party has filed an untimely notice of appeal ... [may grant a party equitable relief in the form of an appeal nunc pro tunc in certain extraordinary circumstances. Initially, an appeal nunc pro tunc was limited to circumstances in which a party failed to file a timely notice of appeal as a result of fraud or a breakdown in the court's operations. In Bass v. Commonwealth [Pennsylvania, Bureau of Corrections], 485 Pa. 256, 401 A.2d 1133 (1979), however, this Court found that where an appellant, an appellant's counsel, or an agent of appellant's counsel has failed to file a notice of appeal on time due to non- negligent circumstances, the appellant should not lose his day in court. Therefore, the Bass Court expanded the limited exceptions for allowing an appeal nunc pro tunc to permit such an appeal where the appellant proves that: (1) the appellant's notice of appeal was filed late as a result of non-negligent circumstances, either as they relate to the appellant or the appellant's counsel; (2) the appellant filed the notice of appeal shortly after the expiration date; and (3) the appellee was not prejudiced by the delay.

(Citations omitted.)

At the November 27, 2002 hearing, Amrit stated that he was the manager of the subject property, that he had power of attorney to act on Lal's behalf[3] and that Lal was unaware of the November 27 hearing. Nevertheless, Lal remained the record owner of the subject property and there was no showing that the Borough's citations were not properly mailed to him, that he did not receive notice of the hearing before the District Justice or that the District Justice's order

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[3] As previously noted, the trial court gave Amrit an opportunity to present the power of attorney; however, it was never produced. Thus, the trial court correctly concluded that Amrit, who had no legal interest in the subject property, did not have standing to participate in the hearing. Moreover, counsel was apparently retained by Amrit to represent Lal's interests and was told to contact only Amrit only. (R.R. 17) It appears that counsel never met Lal or was retained by him. Notwithstanding, the only evidence elicited by counsel was that Amrit did not receive notice of the District Justice hearing. *(Id.)*

of sentence was incorrectly addressed. Thus, Lal failed to demonstrate that his late appeal of the District Justice's order was due to non-negligent circumstances, fraud or a breakdown in the court's operations. Criss.

Although Lal was given a second opportunity at the January 2003 hearing to show that a nunc pro tunc appeal was warranted, Lal again failed to demonstrate the reasons for his failure to timely appeal the District Justice's May 16, 2002 order. Regardless of his reasons for failing to attend the January 17, 2003 hearing[4], neither Lal's counsel nor his father attempted to proffer an explanation as to why Lal did not timely appeal the District Justice's May 16, 2002 order. Without an explanation, the trial court could not determine whether a nunc pro tunc appeal was justified. Accordingly, we conclude that the trial court did not err in denying Lal's petition to reinstate an appeal *nunc pro tunc.*

Lal further contends that the trial court failed to follow proper procedure in resolving the Borough's motion for contempt of court. However, as the trial court noted, the motion for contempt was rendered moot by payment of $18,000 to the Clerk of Courts.

Finally, Lal maintains that the trial court erred in denying his petition to reinstate the appeal inasmuch as there was an outstanding motion to dismiss the charges on the ground that a conflict of interest existed because the Borough Code Enforcement Officer also served as Borough Council president. Where an appeal is not timely filed, the court is divested of jurisdiction and may not address the

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[4]At the hearing, counsel offered a letter from La! requesting a continuance because he had professional obligations in Centre County, where he is a physician. Although the trial court did not specifically rule on the request, it was obviously denied because the trial court proceeded to hear the Borough's motion for contempt of court. The court has broad discretion in granting a continuance, see Corrado v. Thomas Jefferson Univ. Hosp., 790 A.2d 1022 (Pa. Super. 2001), and we find no abuse of discretion inasmuch as the January 17, 2003 hearing was Lal's second opportunity to appeal the District's Justice's order and the Borough's witnesses were present to testify at both hearings.

underlying merits of a case. See Lajevic v. Department of Transportation, Bureau of Driver Licensing, 718 A.2d 371 (Pa. Cmwlth. 1998). Hence, the trial court did not have the power to entertain Lal's motion to dismiss the charges after the petition to appeal nunc pro tunc was denied.

Based on the foregoing, the order of the trial court is affirmed.

JESS S. JULIANTE, Senior Judge

APPENDIX C

HUDSON L. VOLTZ, ESQUIRE
Attorney I.D. No.: 32272
780 East Market Street, Suite 280
West Chester, PA 19382
(610)429-1330

Attorney for: Movant, Borough of Modena, Commonwealth of Pennsylvania

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, BOROUGH OF MODENA Plaintiff	CRIMINAL DIVISION
vs.	CASE NO. 3646-02 through 3724-02
ADHINAYAK RODY LAL Defendant	

ORDER

AND NOW, this 27 day of November, 2002 upon Motion of the Borough of Modena, Commonwealth of Pennsylvania to strike the Appeals of Adhinayak Rody Lal, and after finding of a lack of standing on behalf of Amrit Lal to proceed with the Summary Appeals, it is hereby ORDERED AND DECREED that Motion is granted and judgment shall be rendered in favor of the Borough of Modena against Adhinayak Rody Lal for the sums granted by the District Court in the above captioned matters. Payment to be rendered to the Borough of Modena within fifteen (15) days from the date of this Order.

BY THE COURT:

JUAN R. SANCHES

HUDSON L. VOLTZ, ESQUIRE
Attorney I.D. No.: 32272
780 East Market Street, Suite 280
West Chester, PA 19382
(610)429-1330 Fax (610-429-1160

Solicitor for: Borough of Modena

IN THE COURT OF COMMON PLEAS OF
CHESTER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
BOROUGH OF MODENA

Plaintiff

vs.

ADHINAYAK ROBY LAL

Defendant

CRIMINAL DIVISION

CASE NO. 3646-02 through
3724-02

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ORDER

AND NOW, this 17th day of January, 2003, after argument in open Court and meetings in Chambers, it is hereby ORDERED and DECREED that Defendant's Petition to Reinstate Appeal is hereby DENIED. Plaintiff's Petition to hold Defendant in Contempt is rendered moot by Defendant's payment of $18,000.00 to the Clerk of Courts, said sum to be used as security for payment of fines and costs to be decided by this Honorable Court.

It is further ORDERED and DECREED that from the $18,000.00 posted by Defendant with the Clerk of Courts, the Clerk is directed to release to the Borough of Modena upon the request a sum not to exceed $5,000.00 for use in

connection with property clean up, which is the subject of the this action. The Borough of Modena, its agents, servants and workmen are to account to this Honorable Court for all sums spent in connection with the clean up and rendering safe of the premises known as 19 Mortonville Road, Modena Borough, Chester County, Pa. The balance of the $5,000.00, if any, shall be returned to the Clerk of Court's account.

The escrow account established by the Clerk of Courts shall be interest bearing, if possible, with interest to the prevailing party. It is understood that if, after thirty (30) days, from January 16, 2003, no appeal is filed by the Defendant, the balance of the account shall be released to the Borough of Modena to apply against the outstanding balance of fines, court costs, and interest that may be due to the Borough of Modena. At the time the balance of funds are released, an accounting shall be rendered to the Defendant to indicate what, if any, additional fines and court costs he may owe.

If the Defendant prevails, then the balance of the Clerk of Court's escrow account shall be released to the Defendant, less the sums subtracted by the Borough of Modena for clean up as aforementioned.

BY THE COURT:

JUAN R. SANCHES

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS

v. : CHESTER COUNTY, PENNSYLVANIA

ADHINAYAK ROBY LAL : NO. 3646-02 through 3724-02

: CRIMINAL ACTION

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Hudson L. Voltz, Esquire, for the Borough of Modena
Thomas Ost-Prisco, Esquire, Assistant District Attorney for the Commonwealth
Adhinayak Roby Lal, Pro Se

MEMORANDUM OPINION

By: Sánchez, J. March 27, 2003

On January 17, 2003, this Court denied Defendant Adhinayak Lal's Petition to Reinstate Appeal Nunc Pro Tunc from the judgment entered by the District Court. On February 13, 2003, Defendant Adhinayak Lal filed a Notice of Appeal to the Superior Court of Pennsylvania. We write briefly pursuant to the mandate of Pa.R.A.P. 1925(a).

Defendant Adhinayak Lal's father, Amrit Lal, filed an appeal of the District Court's judgment to this Court. Defendant Adhinayak Lal, however, is the recorded title owner of the subject property. Amrit Lal did not have express or legal authority to file the appeal. On November 27, 2002, we dismissed the appeal for Amrit Lal's lack of standing and entered the judgment of the District Court. Pa.R.Crim.P. 462; Commonwealth v. Slominicki, 773 A.2d 216 (Pa. Cmmw. 2001). Further, we ordered Defendant Adhinayak Lal to pay the judgment entered in favor of the Borough of Modena within fifteen (15) days of the entry of this Court's Order. At this time, Amrit Lal and his attorney were asked whether Defendant Adhinayak Lal was aware of

these proceedings. Amrit Lal told the Court his son was not. (N.T. 11/27/02 at 6, ¶ 6). We advised counsel and Amrit Lal that we would consider a petition to reinstate the appeal, and set a hearing date for Defendant Adhinayak Lal to appear on January 17, 2003 as ordered by this Court. On January 17, 2003, Defendant Adhinayak Lal failed to appear at the hearing to explain why he did not file a timely appeal from the judgment of the District Court. Given his failure to appear, we denied Defendant Adhinayak Lal's Petition to Reinstate Appeal Nunc Pro Tunc.

We then heard the Borough of Modena's Cross-Motion to hold Defendant Adhinayak Lal's in contempt failure to pay the judgment. Amrit Lal decided to settle the case with the Borough of Modena and paid $18,000 for security on the costs of the judgment to avoid this Court holding Defendant Adhinayak Lal in contempt. Therefore, the Contempt Motion became moot.

Defendant Adhinayak Lal's appeal of our January 17, 2002 Order denying the Petition to Reinstate the Appeal Nunc Pro Tunc is untimely and without merit. The timely date for appeal of judgment is no more than thirty (30) days as of the Court's November 27, 2002 Order dismissing the summary appeal for lack of standing and entering the judgment of the District Justice. Defendant Adhinayak Lal failed to appear on January 17, 2003 to be heard on a petition to reinstate the appeal nunc pro tunc, even after we ordered him to appear. An appeal from our January 17, 2003 Order is, therefore, improper. Further, Defendant Adhinayak Lal and his father Amrit Lal have given reason to question the veracity of their statements and actions in this matter.

Accordingly, this Court's Order denying DEfendant Lal's Petition to Reinstate Appeal should be affirmed.

BY THE COURT:
Juan R. Sánchez J

APPENDIX D:
CONSTITUTIONAL AMENDMENTS

AMENDMENT V:

No person shell... be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

A. Roby Lal, Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
(BOROUGH OF MODENA), Respondent

PROOF OF SERVICE

Thomas R. Kellogg, Esquire, a member of the Bar of the Supreme Court of the United States, hereby certifies that on 7th day of May, 2005 he caused to be served by United States first class mail, postage prepaid, three copies of the Petition for a Writ of Certiorari in this matter to the attorney for Respondent at the address set forth below:

Hudson L. Voltz, Esquire
525 Highlands Blvd.
Coatesville, Pa. 19320-5810
(610) 466-9500

This satisfies the requirements of Supreme Court Rule 29(3).

Thomas R. Kellogg, Esquire
Strong Stevens and Wyant
1250 W. Germantown Pike, Suite 300
Plymouth Meeting, Pa. 19462-2444.